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No. 85-917

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MARGIE P. HOLLINS, ANNETTE MCNEIL, LLOYD BROWN, and MAMIE WALLACE,
Petitioners,

vs.

ROBERT LEE POWELL and the CITY OF WELLSTON, MISSOURI,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD H. EDWARDS
CUPPLES, EDWARDS, COOPER & SINGER
7733 Forsyth, Suite 1000
Pierre Laclede Center
St. Louis, Missouri 63105
(314) 862-5900
Attorneys for Respondent City of Wellston

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

THE QUESTIONS PRESENTED FOR REVIEW

I.

THE APPELLATE COURT DID NOT UNCONSTITUTIONALLY AND IN VIOLATION OF ESTABLISHED RULES AND LEGAL PRINCIPLES ORDER A REMITTITUR OF 86.7% OF PETITIONERS' ACTUAL DAMAGE JURY AWARD AND 99.6% OF PETITIONERS' PUNITIVE DAMAGE JURY AWARD (OR IN THE ALTERNATIVE ORDER A NEW TRIAL ON THE ISSUE OF DAMAGES ONLY) BECAUSE THE DAMAGES AWARDED AGAINST RESPONDENTS WERE EXCESSIVE, WERE THE RESULT OF UNDER PASSION AND PREJUDICE ON THE PART OF THE JURY AND WERE NEITHER WARRANTED NOR SUBSTANTIATED BY THE EVIDENCE.

II.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT ORDERING REMITTITUR OR AT THE OPTION OF PETITIONERS A NEW TRIAL SOLELY ON THE ISSUE OF DAMAGES DID NOT VIOLATE THE SEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND PROVIDED PETITIONERS WITH THE PROPER FORUM IN WHICH TO PRESENT EVIDENCE TO SUBSTANTIATE ANY DAMAGES CLAIMED BY PETITIONERS IF PETITIONERS CHOSE THE OPTION OF A NEW TRIAL ON THE ISSUE OF DAMAGES ONLY.

III.

THE PETITIONERS' REQUEST FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED BECAUSE PURSUANT TO SUPREME COURT RULE 17.1, A REQUEST FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED UNLESS THERE ARE SPECIAL AND IMPORTANT REASONS FOR DOING SO.

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REFERENCE TO REPORTED OPINION

The Respondent City of Wellston, Missouri, hereby adopts and incorporates by reference it its entirety as though fully set forth herein the opinion of the Eighth Circuit Court of Appeals in this cause as attached in Appendix A contained in Petitioners' Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

The Respondent City of Wellston, Missouri, hereby adopts and incorporates by reference in its entirety as though fully set forth herein the Statement of Jurisdiction as appears on page 1 of Petitioners' Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The Respondent City of Wellston, Missouri, hereby adopts and incorporates by reference in its entirety as though fully set forth herein the Constitutional Provisions and Rules Involved as appears on page 2 of Petitioners' Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Plaintiffs, purportedly Commissioners of the Land Clearance Authority and Housing Authority for the City of Wellston, filed suit against the City of Wellston, Mayor Robert Powell and Wellston police officers Ingram and Haynes for violating their civil rights under Title 42 Section 1983 U.S.C. and for false imprisonment under Missouri law. These claims arose out of an incident occuring on December 8, 1982.

Plaintiffs filed their complaint on the 13th day of May, 1983. Of particular note is the District Court's order of October 12, 1985, denying Defendants' motion to quash the deposition of Harold Whitfield, attorney for the City of Wellston. The matter was tried before a jury from March 26 through March 28, 1984. The jury returned a verdict in the amount of $300,000 in compensatory damages and $500,000 in punitive damages in favor of Plaintiffs and against Defendant Powell. The jury also entered its verdict of $300,000 in compensatory damages in favor of Plaintiffs and against Defendant City of Wellston.

Defendants Ingram and Haynes received a jury verdict in their favor. The court awarded attorneys fees in the amount of $33,319.50 and costs in the amount of $1,712.55 in favor of Plaintiffs on June 1, 1984.

Subsequent to the trial in this matter, Defendants filed their Motion for Judgment Notwithstanding the Verdict or in the Alternative a New Trial (Appendix C to Petitioners' Petition for Writ of Certiorari), which was denied by the District Court in its Order filed June 7, 1984. (Appendix F to Petitioners' Petition for Writ of Certiorari).

On June 13, 1985, the matter was submitted to the United States Court of Appeals, which then filed a decision herein on September 11, 1985. (Appendix A to Petitioners' Petition for Writ of Certiorari).

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

Jurisdiction in the federal court is alleged by Petitioners to be founded upon 28 U.S.C. Sections 1331 and 1343(a)(3) and upon 42 U.S.C. Section 1983.

ARGUMENT

I.

The Appellate Court Did Not Unconstitutionally And In Violation Of Established Rules And Legal Principles Order A Remittitur of 86.7% Of Petitioners' Actual Damage Jury Award And 99.6% Of Petitioners' Punitive Damage Jury Award (Or In The Alternative Order A New Trial On The Issue Of Damages Only) Because The Damages Awarded Against Respondents Were Excessive, Were The Result Of Undue Passion And Prejudice On The Part Of The Jury And Were Neither Warranted Nor Substantiated By The Evidence.

A. Appeal of the trial court's denial of a Motion for New Trial is the proper forum for challenging an excessive jury damage award.

Autoridad de Las Fuentes LaForest v. Fluviales de Puerto Rico, 536 F.2d 443 (1st Cir. 1976), *House of Kascot Development Corp. v. American Line Cosmetics,* 468 F.2d 64 (5th Cir. 1972), *General Foam Fabricators, supra.*

The standard of review of a damage award is such that an appellate court will not reverse or amend the jury's award unless it is "so excessive or inadequate as to shock the judicial conscience and raise (sic) an irresistible inference that passion, prejudice or another improper cause invaded the trial..." *Corriz v. Naranjo,* 667 F.2d 892, 898 (10th Cir. 1981), *cert. granted,* 456 U.S. 971 (1982). The jury award in this case is so excessive as to shock the judicial conscience. When this award is examined with regard to the two factors which constitute the basis for any damage award, to wit: causation and magnitude, it is obvious that the jury verdict resulted from undue passion and prejudice against the Defendants, and the Appellate Court acted correctly to rectify this situation.

B. Plaintiffs did not present credible evidence of injury beyond embarrassment and humiliation.

The primary case on damage awards in Section 1983 actions is *Cary v. Piphus,* 435 U.S. 247, 98 S.Ct. 1042 (1978). In that case, this Honorable Court held that proof of a constitutional deprivation alone is not sufficient to warrant an award of compensatory damages; that is, injury will not be presumed solely from proof of a constitutional invasion. Plaintiffs must prove their injury as in any tort action. 435 U.S. at 262. This Court recognized that in any situation where a person's constitutional rights have been violated, he is bound to suffer distress. However, this Court ruled that Section 1983 plaintiffs must prove that they were injured or damaged by the actions of defendants before they can obtain compensatory damages. Furthermore, a jury may not increase a compensatory award beyond the amount of actual compensation to deter future wrongful actions. 435 U.S. at 256-257.

In the case at bar, the Commissioners testified as to their embarrassment and humiliation. They admitted that they did not suffer any physical injuries at the hands of the police. As a matter of fact, the Complaint states the damages claimed as "embarrassment, disgrace, and humiliation...injury to their good names and reputations...mental anguish and suffering at being held up to public scorn, ridicule, and derision." (R32-33). Some of the Commissioners attempted to introduce evidence of physical illness due to the arrests, but provided no substantiation or expert testimony to indicate any causation. Chairwoman Hollins and Commissioner Brown sought to demonstrate that the arrests had affected their employment, but after the arrests, Chairwoman Hollins obtained a job paying her $9,500 more than her previous job, and Commissioner Brown acquired a position with the Internal Revenue Service. Chairwoman Hollins indicated that her humiliation was beyond compensation, yet she was not sufficiently concerned about her reputation to pay her overdue rent due to the very Housing Authority of which she was board chairman.

C. The dollar amount placed on the alleged injuries to Plaintiffs is clearly in excess of what is reasonable under the circumstances, and the use of a remittitur or in the alternative a new trial was necessary to prevent the award of excessive damages based upon a lack of substantiation of such damages by Appellants.

When the damage award in this case is compared to similar cases, or cases where smaller damages were awarded for more extensive injury, it is evident that the award was excessive to such a degree as to require the conclusion that passion and prejudice played a role in the jury's decision. It appears that the jury became so enraged at the demeanor and testimony of Mayor Powell that it sought to punish both the Mayor and the City of Wellston with the magnitude of the compensatory award. Hence, each Plaintiff was awarded $75,000 in damages for embarrassment, humiliation, damage to reputation, and emotional distress.

In *Corriz v. Narango, supra,* the plaintiff stopped his car to talk to some friends in another car. Two county sheriffs, one of them intoxicated at the time, arrested plaintiff's friends. Despite the fact his friends told the officers that plaintiff was not involved, they searched him twice. The officers told the plaintiff to leave and then shot him as he did so. The evidence indicated that the plaintiff suffered severe pain and emotional distress as a result of the shooting. In a subsequent incident, some county officers stopped plaintiff's car and told him they had a warrant for his arrest which they failed to produce. As plaintiff drove off, the officers shot at his car and followed him home. In reviewing the Section 1983 damage award of $30,000, the court maintained that the plaintiff had presented adequate evidence of his medical expenses and loss of earnings. He introduced evidence of his personality changes and nightmares. A psychiatrist testified as to his mental state, which the doctor indicated might never be as it was prior to these incidents. The court concluded:

> The testimony conclusively shows that plaintiff underwent dramatic personality changes as a result of the shooting and the false arrest. He suffers from insomnia, paranoia, and traumatic neuroses from which he may never recover. The expert testimony concerning plaintiff's psychological injury was not rebutted by defendants.

667 F.2d 892 (1981).

The Eighth Circuit Court of Appeals previously upheld a jury award of $300,000.00 in damages in a Section 1983 action where the pregnant plaintiff was kicked in the stomach, handcuffed, and forced into a patrol car by a police officer. Even though the plaintiff asked for medical attention, she was driven to a jail twenty miles away and her life was threatened en route. She was arrested, jailed, and her requests for counsel ignored. Due to the beating and the failure of police to provide medical treatment, the plaintiff suffered physical and emotional injuries and her unborn child died. Medical experts testified to the severe physical injuries she suffered and there was ample evidence of the emotional trauma she experienced as a result of these events. *Herrera v. Valentine,* 653 F.2d 1220 (8th Cir. 1981).

In a 42 U.S.C. Section 1981 discrimination action, the Eighth Circuit Court of Appeals acknowledged plaintiff's evidence of the following:

> By her direct testimony, plaintiff established that following her discharge she was unable to obtain other employment for a substantial period of time [some 13 months]; that she was forced to borrow money from relatives in order to sustain her family during that period; and that as a result of her financial dilemma, she suffered sleeplessness, anxiety, embarrassment, and depression.

Block v. R. H. Macy & Co., Inc., 712 F.2d 1241, 1245 (8th Cir. 1983).

In concluding that the compensatory award for embarrassment, humiliation, and mental anguish of $12,402 was ample, the Court said: "Its award strikes us as very Close to the *maximum* which could be deemed reasonable on this evidence." 712 F.2d 245.

In *Wheatley v. Ford*, 679 F.2d 1037 (2nd Cir. 1982), the Second Circuit reduced an award of $55,000 against police officers in a Section 1983 action for unlawful arrest and excessive use of force. The Court determined that an award of $25,000 was warranted by the evidence of injuries. The Court stressed that although the plaintiff was physically abused by striking and hitting, the injuries were temporary. The only permanent injury alleged by the plaintiff was a perforated eardrum. The medical expert testifying for plaintiff could not say that the perforated eardrum was caused by the abuse. The Court remanded the case for a new trial unless the plaintiff was willing to remit all damages in excess of $25,000.

Where Section 1983 damages have been awarded for embarrassment and damage to reputation, the awards have not even approached $75,000. The plaintiff in *Busche v. Burkee*, 649 F.2d 509 (7th Cir. 1981), *cert. denied*, 454 U.S. 897 (1982), was a police officer named as an unindicted co-conspirator. The Mayor learned of this indictment from a newspaper article and had the plaintiff's employment terminated. The Mayor appealed the $10,000 compensatory damage award based on "damage to reputation and emotional distress...suffered as a result of his unlawful termination." 649 F.2d at 519. The District Court found that the plaintiff had a good reputation before the discharge and that his reputation suffered due to the publicity about his termination which linked his termination to the indictment and implied wrongdoing on his part. The Second Circuit upheld the $10,000 judgment.

The plaintiff in *Eckerd v. Indian River Sch. Dist.*, 475 F. Supp. 1350 (D.Del. 1979) was dismissed from his employment

claiming unconstitutional discharge and damages for embarrassment, humiliation, and emotional distress. The plaintiff's wife testified as to the change in his personality due to the discharge. He introduced evidence of medical treatment. The Court rendered $5,000 as compensatory damages.

In *Thomas v. Sams*, 734 F.2d 185 (5th Cir. 1984), in which the local university president was arrested by the Mayor with City Council knowledge, he was awarded $7,500 in actual damages against the City. He was detained for two hours and it is hard to believe that his embarrassment, humiliation, and emotional distress would be any less than that of the Commissioners. His position in the community was in no way inferior to theirs.

Mr. Parke testified that the Commissioners continued to carry on with their work as usual after the arrest. Chairwoman Hollins' former boss testified that her job rating did not deteriorate for the two weeks following the arrest.

Damages for false arrest rarely approach the amount of the judgment awarded in the case at bar. The Court in *Winfield v. United States*, 430 F. Supp. 912 (S.D.N.Y. 1977), awarded plaintiff $1,500 for his four and one-half hours of detention. A woman was awarded $1,000 for an unlawful arrest where she was kept overnight and suffered humiliation and embarrassment. *Lamb v. Cartwright*, 393 F.Supp. 1081 (E.D.Tex. 1975), *aff'd* 524 F.2d 238 (5th Cir. 1975).

The Missouri Court of Appeals upheld a compensatory damage award for false arrest against the defendant in the amount of $500. *Walkley v. Sears, Roebuck & Co.*, 536 S.W.2d 169 (Mo.App. 1976). The plaintiff's head was banged against a wall, he was handcuffed, and he was kept in a room for one hour. He sought medical attention at a hospital for the injuries to his head. Similarly, an award of $5,000 actual damages was awarded where the plaintiff was assaulted and threatened, resulting in medical treatment and loss of employment due to the injuries sustained. *Keenoy v. Sears, Roebuck & Co.*, 642 S.W.2d 665 (Mo.App. 1982).

In considering whether the compensatory damage award in this case was excessive, this Court should examine two relevant factors: the opportunity provided to the Commissioners to avoid any damages in the first place and the effect of excessive damage awards on financially faltering municipalities.

This Honorable Court adopted tort damages as the model for Section 1983 damages in *Monell v. Dept. of Soc. Serv. of City of NY*, 436 U.S. 658, 98 S.Ct. 2018 (1978). Increasingly, courts awarding tort damages have inquired into the plaintiff's ability to avoid injury. The fact that the Commissioners were asked to leave and were warned that they would be arrested if they remained is uncontroverted. The Commissioners viewed the Mayor's behavior as irrational. The common sense reaction would have been to adjourn the meeting to another location and take subsequent legal action. Instead, they chose to be arrested and embarrassed. Compare this situation to the usual fact pattern in a Section 1983 case, where the plaintiff is taken unawares by police officers and physically forced to submit to the arrest.

There is no question that Wellston is a "poor city". (T3-74). In *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 245, 101 S.Ct. 2748 (1981), this Honorable Court held that punitive damages were not available against a municipality in a Section 1983 action. In so holding, it discussed the policy problems arising from damage awards against municipalities. In reviewing the legislative history of Section 1983, this Court emphasized the legislators' concern that extensive liability could destroy local governments. 453 U.S. at 666, fn. 27, 28. The incredible magnitude of the award in the case is just the burden the legislators feared. The financial impact of such a judgment on all of the citizens of the City of Wellston cannot be ignored.

The only explanation for the marked discrepancy between the award in this case and the award in similar cases is that the jury became enraged at Mayor Powell or the witnesses on behalf of the Defendants and utilized the compensatory damage award to

punish them and to deter future such actions. Neither purpose is a proper one for an award of compensatory damages. *Carey, supra,* at 256-257.

I.

The Decision Of The United States Court Of Appeals For The Eighth Circuit Ordering Remittitur Or At The Option Of Petitioners A New Trial Solely On The Issue Of Damages Did Not Violate The Seventh Amendment To The Constitution Of The United States And Provided Petitioners With The Proper Forum In Which To Present Evidence To Substantiate Any Damages Claimed By Petitioners If Petitioners Chose The Option Of A New Trial On The Issue Of Damages Only.

The Eighth Circuit Court of Appeals did not err in this cause in ordering remittitur, or, in the alternative, a new trial. Clearly, the amounts awarded were totally out of accord with the evidence produced at trial by the Appellants, and the appellate court recognized this fact.

Of prime importance is the fact that this case does not turn upon the constitutionality of remittitur, or in the alternative a new trial on the issue of damages, in relation to the Seventh Amendment, but is merely a question of the evidence needed to support an award of damages. This is clearly demonstrated by the fact that the Eighth Circuit Court of Appeals, in its decision, did not merely reverse the lower court, or order remittitur alone, but rather provided the Appellants with the alternative of a new trial, thus providing Appellants with a second opportunity and a second forum in which to present their evidence, possibly new and sufficient evidence, which would support any damages awarded. In this case, the evidence did not support the damages awarded, Appellants evidence was insufficient, as recognized by the Eighth Circuit Court of Appeals, and Appellants' application for Writ of Certiorari herein should be

denied. The issue involved, as shown by the record, is merely an evidentiary question as to whether the damages awarded were supported by competent evidence, and, as such, can be easily resolved at the District Court level without the necessity of considering any questions regarding the Seventh Amendment to the United States Constitution.

III.

The Petitioners' Request For Writ Of Certiorari Should Not Be Granted Because Pursuant To Supreme Court Rule 17.1, A Request For Writ Of Certiorari Should Not Be Granted Unless There Are Special And Important Reasons For Doing So.

Supreme Court Rule 17.1 states that "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons therefor." Furthermore, this Court has stated that "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S.Ct. 422, 423, 67 L.Ed. 72." *Rice v. Sioux City Memorial Park Cemetary, Inc.*, 75 S.Ct. 614, 620, 349 U.S. 70.

In the case at bar, clearly there are no special and important reasons for the court to grant writ of certiorari for the reason that this case clearly involves, as demonstrated by the record herein and Petitioners' own Petition for Writ of Certiorari, a simple issue of the inability of Petitioners to present sufficient evidence to substantiate and warrant the excessive damages awarded by the jury. This factor is also clearly demonstrated in the record by the facts (1) that the heart of the opinion issued by the Ciruit Court of Appeals relates to the excessive nature of the damages awarded by the jury in the lower court and (2) the ap-

pellate court attempted to correct this situation and further provided the Petitioners with a second opportunity to present additional evidence by making the option of a new trial on the issue of damages part of its order. Therefore, the problem having been resolved competently and in accordance with precedent, there is absolutely no need for this Court to devote its limited time to a mere evidentiary question.

Furthermore, the doctrine of remittitur has long been accepted in this country and there are no conflicts of opinion and authority between the Circuit Courts of Appeals on this matter. Wherefore, Petitioners' Writ of Certiorari should be denied.

CONCLUSION

The issues raised by Petitioners as to the constitutionality of the use of remittitur by the Appellate Court in this matter falls by reason of the fact that the appellate court gave the Petitioners the option of a new trial on the issue of damages alone. The material issue in this case is evidentiary, not constitutional. Petitioners did not present evidence sufficient to support the damages awarded, and the appellate court performed as it should in making this finding. Therefore, Petitioners' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Cupples, Edwards, Cooper & Singer
Richard H. Edwards
7733 Forsyth, Suite 1000
Pierre Laclede Center
St. Louis, Missouri 63105
(314) 862-5900

Attorneys for Respondent
City of Wellston

APPENDIX

APPENDIX A

The Respondent City of Wellston, Missouri, hereby adopts and incorporates by reference in its entirety as though fully set forth herein Appendix A of the Petitioners' Petition for Writ of Certiorari.

APPENDIX C

The Respondent City of Wellston, Missouri, hereby adopts and incorporates by reference in its entirety as though fully set forth herein Appendix C of the Petitioners' Petition for Writ of Certiorari.

APPENDIX D

The Respondent City of Wellston, Missouri, hereby adopts and incorporates by reference in its entirety as though fully set forth herein Appendix D of the Petitioners' Petition for Writ of Certiorari.

APPENDIX E

The Respondent City of Wellston, Missouri, hereby adopts and incorporates by reference in its entirety as though fully set forth herein Appendix E of the Petitioners' Petition for Writ of Certiorari.